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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HAZARD CONTROL TECHNOLOGIES, INC., a Florida corporation f/k/a FUEL BUSTER LABORATORIES, INC.,

Petitioner,

v.

HAZARD MITIGATION SUPPLY, INC., a Sole Proprietorship a/k/a HAZARD MITIGATION, a/k/a FIRE SERVICE PLUS, a/k/a FIRETARD, INC., RONALD E. THAMES, and RONALD B. THAMES,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

FREEMAN W. BARNER, JR. *
WATTERSON, HYLAND & KLETT, P.A.
4100 RCA Boulevard, Suite 100
Palm Beach Gardens, Florida 33410
(561) 627-5000

* Counsel of Record

Attorney for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTIONS PRESENTED

Whether a United States District Court's application of the law of the state in which it sits to state law contract claims, after the action has been transferred for convenience from the United States District Court of another state pursuant to 28 U.S.C. § 1404(a), violates the federalism principle of *Erie Railroad Company v. Tompkins* and is in conflict with prior decisions of this court because the state law of the initial "forum" was not utilized.

Whether the transferee court's state law is misapplied to invalidate restrictive covenants, after the action has been transferred for convenience from the United States District Court of another state pursuant to 28 U.S.C. § 1404(a), when the parties' contractual choice-of-law is that of another state.

Whether a United States District Court may engage in a conflict of law analysis to determine which state law is applicable to state law contract claims, after the action has been transferred for convenience from the United States District Court of another state pursuant to 28 U.S.C. § 1404(a), and in circumstances where the parties have contractually agreed to application of the law of the state of the initial forum.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Hazard Control Technologies, Inc., states that it has no corporate parents and that no publicly-held company owns any of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Hazard Control Technologies, Inc., respectfully petitions for a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit in *Hazard Control Technologies, Inc. v. Hazard Mitigation Supply, Inc., et al.* No. 00-14416-FF, (rule 36-1 *per curiam* affirmance May 31, 2001) and the Eleventh Circuit opinion of July 20, 2001, (denying rehearing) are not published. (App. A, 1a and App. E, 12a). The order of the *District Court in Hazard Control Technologies, Inc. v. Hazard Mitigation Supply, Inc., et al.*, (CIV. No. 1:99-CV-3336-(CC) ND GA. July 18, 2000) is not published. (App. B, 4a).

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit was rendered on May 31, 2001. The Eleventh Circuit denied a timely petition for rehearing on July 20, 2001.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

28 U.S.C. § 1404. Change of Venue

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

. . .

28 U.S.C. § 1406. Cure or waiver of defects

> (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall

> dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.
>
> (b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.
>
> . . .

The provisions of *Florida Statutes*, § 542.335 that are relevant to this petition are represented in the appendix at 13a-17a.

STATEMENT OF THE CASE

This case originated in the United States District Court for the Southern District of Florida. On September 10, 1999, Petitioner, as Plaintiff, filed a multi-count complaint against Respondents, as Defendants, for the violation of the Lanham Act alleging false description of product origin and false description or representation in violation of the Act, as well as for patent infringement. Separate counts for breach of contract, by violating restrictive covenants in those contracts, also were filed against Respondents. The Federal District Court's original, exclusive jurisdiction was based upon 28 U.S.C. § 1338(a), 15 U.S.C. § 1125(a), and 35 U.S.C. § 271 *et. seq*. Supplemental jurisdiction pertaining to the breach of contract claims was predicated upon 28 U.S.C. § 1367(a).

Plaintiff's business, and the subject of this litigation, is the manufacture and supply of fire suppressant material which is sold commercially under the trademark "F-500." F-500 is a patented product (the "Product") which is a biodegradable, non-toxic, flammable firefighting concentrate chemical composition. Petitioner owns the letters patent for the Product. The Product has many uses such as extinguishing fires in electrical transformers that contain a large volume of kerosene, extinguishing car fires, fires related to heavy

petroleum products such as gasoline and tires, for use in building sprinkler systems and for use with other devices to suppress fires.

Respondent Ronald E. Thames was the inventor of the product. In 1994 Petitioner acquired various rights to technology and products pursuant to a shareholder's agreement to which Mr. Thames was a signatory. By this agreement Mr. Thames and parties related to him conveyed to Petitioner all of their interest in the technology and the products, including formulas, processes, patents and information owned or possessed by Mr. Thames or any of his affiliates concerning the controlling and preventing of fires.

Commencing at the time of the 1994 shareholder's agreement Mr. Thames was responsible for the day-to-day management of Petitioner's business. This included responsibility of research, product development, product testing, demonstrations, manufacturing and obtaining government approvals and patents. Pursuant to the shareholder's agreement Mr. Thames owned a percentage of the Petitioner corporation. He held the title of President until 1997. Thereafter, he continued in the company as an employee, officer and director.

Mr. Thames' son, Ronald B. Thames, had been an employee of Petitioner. In September, 1996 as an employee he signed a "confidentiality agreement" that restricted the use or disclosure of the company's confidential information including formulas, chemicals, mixing data and other information. In May, 1997, a distributor agreement was entered into between Petitioner and Hazard Mitigation Supply, Inc., another Respondent in this action and which is a sole proprietorship owned by Respondents Ronald E. and Ronald B. Thames. Among other matters, the distributor agreement acknowledged that the name "Fuel Buster" was owned by Petitioner and that the distributor would maintain the confidentiality of Petitioner's trade secrets and business

information. The agreement also provided that for a period of one year after termination of the agreement the distributor would not engage in the sale or promotion of any product competitive with Petitioner's products. The agreement further provided that Petitioner would be entitled to appropriate injunctive relief to prevent a breach of this provision since any breach was acknowledged to cause irreparable injury to Petitioner since monetary damages were not an adequate remedy.

Respondent Ronald E. Thames exited Petitioner's business in February, 1998. This was pursuant to an "Exit Agreement" between Petitioner and Mr. Thames, who then still owned a portion of the capital stock of Petitioner. At that time Mr. Thames resigned as an employee, officer and director of Petitioner and became a consultant to the company for several months. The Exit Agreement contained a "confidentiality agreement; non-compete agreement", that protected Petitioner's "confidential information." By this provision Mr. Thames agreed not in any manner to compete with the business of Petitioner for a period ending two years from the date of the agreement. "Competition" was defined as carrying on business "anywhere in the world relating to the business engaged in by [Petitioner]. . ." This world—wide restriction was co-existent with the marketing plan contained in the first shareholder's agreement of 1994 which Mr. Thames signed. The marketing plan was to market, sell and enter into distribution and other agreements to market and sell the Products throughout the world. Similar to the distribution agreement, the Exit Agreement contained Mr. Thames' acknowledgment that violation of the covenants would cause immeasurable and irreparable harm to Petitioner and that, among other relief upon breach of the agreement, Petitioner would be entitled to injunctive relief.

The Exit Agreement further contained a provision that the agreement would be enforced and construed according to the

laws of the State of Florida and in any court of competent jurisdiction. The initial shareholder's agreement signed by Mr. Thames contained the same provision. The distributor agreement contained the consent of the parties to jurisdiction in the State of Florida in Palm Beach County or the Court of the United States of the Southern District of Florida. The agreement also waived any objection to venue in the designated courts and similarly provided that the agreement would be governed by the laws of the State of Florida.

The State of Florida had a substantial relationship with Petitioner's business and the Respondents themselves. The initial Shareholders' Agreement of January 8, 1994, was between Ronald E. Thames and Constantine Peter Chambers as shareholders of Fire Busters International, Inc.[1] The agreement reflects this corporation was a Florida corporation with its principal place of business in Delray Beach, Florida. Notices under the agreement were to be given to the corporation at that address. Notices to Chambers were directed to be given to him in Delray Beach, Florida as well. In that agreement it also was acknowledged by the parties that a substantial portion of the negotiations, anticipated performance and execution of the agreement occurred or would occur in Palm Beach County, Florida. The parties further agreed that the agreement would be governed by the laws of the State of Florida without regard to principles of conflict of law.

Likewise, the amended and restated shareholders' agreement of November 13, 1995, reflects that Fire Busters International, Inc. was still a Florida corporation with a Delray Beach, Florida principal place of business. The agreement contained the same provisions as the initial shareholders' agreement with respect to the governing law,

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[1] Hazard Control Technologies, Inc. is a successor to Fire Busters International, Inc.

jurisdiction and venue being that of the State of Florida. (*Id.* App. Vol. 1, tab 3, Pg. 1, 25). This document, which also was executed by Defendant Ronald E. Thames, showed there were seven shareholders at that time, five of them having Florida addresses. Furthermore, resolution of disputes among the shareholders relating to their stock was mandated by the agreement to be through the use of the trust account of a Palm Beach County, Florida attorney when there were involved stock purchase and sale transactions.

The February 1998 Exit Agreement between Petitioner and Ronald Thames recites that Hazard Control Technologies, Inc. was a Florida corporation. The May 1997 Distributor Agreement at issue with Fuel Buster Laboratories, Inc., to which Petitioner was a successor, similarly reflects that company was a Florida corporation.

Ronald E. Thames' departure from Petitioner's company was in the form of a "forced resignation" as an employee and in other capacities in order to protect the business and its Products, customers of the business and the public at large.[2] His son, Ronald B. Thames, disassociated with the company at the same time. Thereafter, they engaged in various egregious misconduct, involving competition and other conduct in violation of their contractual agreements with Petitioner. This included demonstration and sale of the firefighting product referred to as "Fuel Buster", a trade name of Petitioner's Product, providing consulting services and selling firefighting Product, using Fuel Buster's systems owned by Petitioner without its authority, and distributing over 1,000 gallons of Petitioner's Product that Petitioner had recalled and discarded. Petitioner also had evidence that Respondents never stopped using the trade name "Fuel

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[2] An exhibit to the Exit Agreement delineated numerous claims of misconduct against Mr. Thames that were released by Petitioner in an effort to avoid lengthy and time-consuming litigation.

Buster", confused the public with the name, never ceased to compete with Petitioner who had been unaware that the competition was occurring, counterfeited Petitioner's Product, competed with Petitioner by selling "knock-off" product around the world, and set up off-shore corporations to disguise the transactions in which they were engaged to Petitioner's harm.[3]

Respondent's misconduct resulted in litigation being initiated by Petitioner in the United States District Court in Florida in September, 1999. Shortly thereafter, on September 17, 1999, a preliminary injunction was entered by the Florida court against Respondents. (App. C, 7a). The injunction was entered after negotiations between counsel for Petitioner and Respondents and was agreed to and signed by counsel. Among other matters, it enjoined all of the Respondents and their agents, employees, etc. from:

a. The manufacture, mixing, blending, preparation or purchase of any fire suppressant chemical or component for the making of any fire suppressant chemical;

b. Transporting, distributing, selling or offering to sell any fire suppressant chemical or component for the making of a fire suppressant chemical;

c. Using, without authorization, any of the Plaintiff's trademarks, including the trademarks "FUEL BUSTER";

. . .

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[3] *See* Petitioner's proffer to the District Court at the injunction modification hearing that is the subject of this petition. (Doc. 49-Pg. 6, 38). Petitioner was not granted a requested evidentiary hearing to present this additional evidence. Substantial other evidence of misconduct was in the record at the time of the hearing.

The injunction provided that after the expiration of fifty (50) days Respondents/Defendants could move to dissolve the injunction "for good cause shown."

On December 20, 1999, the Florida District Court judge transferred the venue of the case to the United States District Court for the Northern District of Georgia for all further proceedings. (App. D, 10a). The order was entered on Petitioner's November 1999 motion for change of venue pursuant to 28 U.S.C. § 1404, for the convenience of the parties and other persons.[4] Petitioner asserted in its motion that its initial choice of venue was proper based upon the presence of forum selection clauses in the parties' underlying contracts. However, as a basis for the motion to transfer venue, Petitioner informed the court that discovery in the case had revealed that the more convenient forum for the parties, witnesses and potential parties was the Georgia court to which a venue change was requested.

It is noteworthy that in the Florida District Court Respondents contested neither jurisdiction, venue, the application of Florida law nor the validity of the restrictive covenants. In their subsequently filed answer, Respondents admitted the court's subject matter and supplemental jurisdiction as well as its personal jurisdiction over them. No affirmative defenses were pled. (Doc. 25 - Pg. 1).

On February 17, 2000, Respondents served a motion to modify the preliminary injunction entered by the Florida District Court. In essence, the motion alleged that the contractual period of non-competition would expire for both the Exit and distribution agreements by May, 2000, and Respondents wanted to engage in the fire suppressant business. Petitioner filed a response to the motion and a

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[4] The motion was filed subsequent to the District Court's order to show cause with respect to venue. In the order of transfer the court made no determination that Petitioner's initial venue selection was improper.

cross-motion for enlargement of the agreed preliminary injunction to include other entities and to prohibit Respondent's disclosure of trade secrets. Petitioner requested an extension of the non-compete period due to Respondents' violation of the agreements as well as violation of the Court's order enjoining competition. Florida law was urged in support of Petitioner's position. Petitioner requested an evidentiary hearing on the motions.

The Georgia District Court conducted a hearing on July 18, 2000 on the injunction motions. Only arguments of counsel were presented. No evidence was permitted. On the same date as the hearing, the Court entered an order modifying the injunction by finding paragraphs (a) and (b) of the injunction to be null and void as of the date of the court order. (App. B, 4a). In essence, this modification permitted Respondents to compete with Petitioner and to engage in the public domain in the business of selling firefighting chemicals. The remaining three provisions of the injunction remained in full force and effect. Plaintiff's motion for enlargement of the preliminary injunction was denied as moot.

In his order the lower Federal District Court judge did not apply the law of Florida to the injunction issues being adjudicated. The District Court judge disregarded Florida law on the premise that the non-compete provisions violated Georgia public policy and that the State of Georgia had a greater interest in the issue than Florida because the parties resided in Georgia and the fire suppressant products were manufactured in that state. The judge applied Georgia law to the agreements. The Court further found that the duration of non-compete in the agreements had expired pursuant to their own terms, which he said warranted modification of the injunction. The world-wide non-compete clauses also were found overly broad and unenforceable under Georgia law. A Georgia case was cited as authority for the over breadth, *Enron Capital and Trade Resources Corp. v. Pokalsky*, 490 S.E. 2d 136 (1997).

On August 16, 2000, Petitioner timely filed a notice of appeal to the Eleventh Circuit Court of Appeals of the District Court's order of July 18, 2000. The Circuit Court's jurisdiction was based upon 28 USC § 1292(a)(1), since the appeal was from an interlocutory order of a district court modifying an injunction and declining to extend an injunction. On May 31, 2001, the Eleventh Circuit entered a judgment affirming, *per curiam*, the District Court's order. (App. A, 1a). The Eleventh Circuit denied Petitioner's request for rehearing on July 20, 2001. (App. E, 12a). This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's affirmance of the lower District Court's order resolved, incorrectly, an important issue of federal law that contravenes mandates of this court in *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) and long-established fundamental principles of policy pertaining to our federal system. The Eleventh Circuit's decision further undermines the rule of this court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and disregards the policy underlying § 1404(a) transfers of venue for convenience. In so doing, the Eleventh Circuit deprived Petitioner of its state law advantages obtained in the initial Florida forum, affirmed a change in the law-not just of courtrooms, and caused Petitioner to be denied its legal rights and remedies. As a consequence, the decision serves to encourage forum-shopping and cause courts to be reluctant to grant transfers for convenience if doing so could prejudice suits appropriately filed in an initial forum.

I. THE DECISION BELOW VIOLATES THE FEDERALISM PRINCIPLE OF *ERIE RAILROAD COMPANY V. TOMPKINS* AND IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT REGARDING THE LAW APPLICABLE TO STATE LAW CLAIMS AFTER A § 1404(a) TRANSFER FOR CONVENIENCE

The decision below affirming application of Georgia law to state law claims, after a change of venue from a Florida District Court pursuant to 28 U.S.C. § 1404, violates the federalism principle of *Erie Railroad*, *supra*, and is in conflict with *Ferens*, *supra*, because Florida was the transferor and "forum" state and its law was required to be applied after the change of venue. This Court has taken care to review on a petition for certiorari the doubtful application by a court of appeals of "the Erie rule". *See*, *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956); *Semtek Int. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

By applying Georgia law, the law of the transferee state, the lower District Court disregarded the policy underlying section 1404(a) transfers that has its real foundation in *Erie Railroad*. "The Erie rule remains a vital expression of the federal system and the concommitant integrity of the separate States." *Ferens*, *supra*. The primary issue in this case is what state law applies on a transfer of venue for convenience pursuant to 28 U.S.C. § 1404(a). The policy underlying the application of state law upon a section 1404(a) transfer was not adhered to by the lower court.[5]

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[5] The issues in this proceeding involve the construction and enforcement of non-compete and other provisions of a contract. These matters are controlled by state as opposed to federal law. *Vernon v. Resolution Trust Co.*, 907 F. 2d 1101, 1109 (11th Cir. 1990); *In Re: Printronics, Inc.*, 189 BR 995, 1002 (Bk. Ct. N.D. Fla. 1995) (citing *Butner v. U. S.*, 440 U.S. 48 (1979)).

Plaintiff initially filed this case in the United States District Court in Florida. This determined that Florida was the "forum state" for purposes of deciding which state law to apply. The case was transferred to the Georgia District Court by reason of considerations of convenience pursuant to 28 U.S.C. section 1404(a). Therefore, Florida law should have been applied regardless of a transfer of venue to the Georgia District Court. *See, Quality Inns Int., Inc. v. Tampa Motel Assoc., Ltd.*, 154 FRD 283 (M.D. Fla. 1994) (citing *Van Dusen v. Barrack*, 376 U.S. 612 (1964)). This Court decided in *Ferens*, *supra*, that under a section 1404(a) transfer the transferee court must apply the same law the transferor court would have applied regardless of whether Plaintiff or Defendant initiates the transfer.[6] *Id.* 523. *See, also, KW Plastics v. U. S. Can Co.*, 2001 W.L. 135722, p. 4 (M.D. Ala. 2001). By applying Georgia law the lower District Court did not follow the mandate of *Ferens* in this case. This dictated a different result in the lower court than if Florida law had been applied.

The vital reasons for the transferee court being required to apply the transferor state's law under a section 1404(a) transfer are, as observed in *Ferens*, *supra*, 523:

(a) section 1404(a) should not deprive a party of state law advantages that exist absent diversity jurisdiction;

(b) section 1404(a) should not create or increase opportunities for forum shopping; and,

(c) the decision to transfer venue under section 1404(a) should be based on "considerations of convenience and the interests of justice," and not on potential prejudice ensuing from a change in the law.

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[6] *Ferens* extended to all transfers under section 1404(a) the rule in *Van Dusen* that mandated application of the law of the transferor state to transfers initialed by a Defendant. *Ferens, supra.*

The District Court's application of Georgia law resulted in a change in the law applicable to the issues. A section 1404(a) transfer only authorizes a change in courtrooms. *See*, *Ferens*, *supra*, 523 (quoting *Van Dusen*, *supra*, 635-37). In so doing, the Eleventh Circuit's affirmance of the Georgia District Court frustrated the remedial purposes of section 1404(a). Moreover, by changing the law the court undermined the Erie rule in a serious way by depriving Petitioner of its state law advantages. *See*, *Id.* 522, 526. As this court noted in *Ferens*, if a change in the law could be obtained for a § 1404(a) change in venue, the section might well be regarded as primarily a forum-shopping instrument. Further, and more significantly, courts would be reluctant to grant transfers, despite the convenience, if doing so would prejudice the claim of a plaintiff who had initially filed the suit in a permissible forum. *Id.* 522-23.

This case was filed in a permissible forum, the United States District Court for the Southern District of Florida. The propriety of jurisdiction and venue in that Court was not an issue. Agreements with Defendants sued upon provided for Florida venue and application of Florida law.[7] Defendants stipulated to a preliminary injunction, in the District Court in Florida, enforcing a contractual non-compete clause with a specified duration. After significant discovery had been conducted the Florida District Court transferred venue to the United States District Court for the Northern District of Georgia under 28 U.S.C. § 1404, for the convenience of the parties and other persons. The order of transfer was entered on Plaintiff's motion for transfer of venue under § 1404. This was not inappropriate. *See*, *Ferens*, *supra* 523; *Azrelyant v. The B. Manischewitz Co.*, 2000 W.L. 264345, p. 4 (E.D. N.Y. 2000) (there is no barr to plaintiff filing a § 1404(a) motion to

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[7] Although not required, the parties, their relationship and agreements had a substantial relationship with the State of Florida. Petition pgs. 4-6.

transfer venue where change in circumstances since filing suit determines motion be filed).

As a further matter, Respondents' consent to jurisdiction in the Florida court must be treated as consent to venue in that court as well. *See, Zumbro, Inc. v. Calif. Natural Products*, 861 F. Supp. 773 (D. Minn. 1994); *National Union Fire Ins. Co. of Pittsburgh, PA v. Frasch*, 751 F. Supp. 1075 (S.D. N.Y. 1990). As mentioned, venue in the Florida District Court never was challenged. If there ever were any venue objection, which is not perceived, it was waived by not being raised. *CSX Trans. Inc. v. Johnson*, 2000 W.L. 1566540 (S.D. Ala. 2000) (defense of improper venue must be raised either by timely responsive pleading or by motion within the time allowed for an answer, or the objection is waived); *Raytheon Co. v. Sanyo Electric, Inc.*, 1971 W.L. 16677 (N.D. Ill. 1971) (general denial insufficient to raise venue questions); *see, Orb Factory, Ltd. v. Design Science Toys, Ltd.* 6 F. Supp. 2d 203 (S.D. N.Y. 1998) (defendant waived objections to improper venue in trademark infringement case —benefits of 1406(a) transfer to apply law of transferee district, where initial venue selected is improper, no longer available). Venue is a privilege that may be waived despite its significant choice-of-law implications. *Manley v. Engram*, 755 F2d. 1463, 1468 (11th Cir. 1985).

The lower district court's application of Georgia law deprived Petitioner of substantive legal rights. The laws of Florida and Georgia are vastly different on the key issues that are determinative of this proceeding. If the law of Florida had been applied, there would have been a different result in the District Court.

If a restrictive covenant is overly broad, a Florida court will rewrite the covenant pursuant to *Florida Statutes*, section

542.335(1)(c).[8] (App. F, 14a). This section expressly provides, in pertinent part:

> If a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court *shall* modify the restraint and grant only the relief reasonably necessary to protect such interest or interests. (*e.s.*)

In Florida, an otherwise reasonable restrictive covenant cannot be held invalid due to being unreasonable as to the time, place or both. Voiding such contracts, as opposed to enforcing them in a reasonable manner, is contrary to the intent of the statute. The statute was passed in the first place in order that these agreements, which were void at common law, would be valid. *Healthcare Financial Enterprises, Inc. v. Levy*, 715 So. 2d 341, 343 (Fla. 4th DCA 1998). Holding such an agreement void frustrates the intent of the contracting parties. The "all or nothing" approach of voiding a restrictive covenant also is inconsistent with the legislative intent to allow courts to apply equitable principles in these cases in order "to avoid unfair and unjust results" in circumstances where a reasonable period of time or geographical area is not

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[8] Petitioner does not concede that the restrictive covenants are overly broad in geographical area. Petitioner's predecessor corporation was formed to do business throughout the entire world, as its first shareholder agreement reflects. This agreement was signed by Defendant Ronald E. Thames. The lower District Court was apprised of the worldwide marketing plan, and proffered that the business was conducted worldwide, at the injunction hearing resulting in the order appealed. (Vol. 3; Doc. 49, Pg. 43). The reasonableness of the restriction's geographical area is determinable based, in part, on the factual circumstances of a particular case in Florida, *Kofoed Public Relations Assoc., Inc. v. Mullins*, 257 So. 2d 603, 604 (Fla. 4th DCA 1972), and in Georgia as well. *Fire Arms Training Systems, Inc. v. Sharp*, 445 S.E. 2d 538, 540 (Ga. Ct. App. 1994). There was no evidentiary hearing permitted in the lower court at which these factual matters could be presented and considered.

capable of precise calculation. *Id.*; *see*, *Corporate Management Advisors, Inc. v. Boghos*, 756 So. 2d 246 (Fla. 5th DCA 2000). It is an abuse of discretion under Florida law for a court not to rewrite an overbroad restrictive covenant. *See*, *Santana Products Co. v. Bon Korff*, 573 So. 2d 1027, 1028 (Fla. 2d DCA 1991) (court rewrote non-compete lacking geographical limitation).

Conversely, the Georgia constitution contains a provision prohibiting the general assembly from authorizing any contract or agreement which could have the effect of defeating or lessening competition. Such agreements are declared to be unlawful and void. *Ga. Const.*, Art. III, § VI, ¶ V(C).[9] In 1990 the Georgia legislature passed a comprehensive enactment expanding the validity of contracts in partial restraint of trade, including non-compete covenants. *See*, *OCGA* § 13-8-2.1. In the act there are many similarities to the cited Florida statute. Nevertheless, the Georgia Supreme Court held the statute unlawful and void for violating the Georgia constitutional provision that prohibits the legislature from authorizing contracts in general restraint of trade. *See*, *Jackson and Coker, Inc. v. Hart*, 405 S. E. 2d 253 (Ga. 1991). Furthermore, *Enron Capital*, *supra*, cited by the lower district court as authority for its decision, is further evidence of judicial treatment of restrictive covenants under Georgia law. The *Enron Capital* court found the restrictive covenant in that case "particularly distasteful" and in contravention of Georgia public policy, where the non-compete was worldwide and further contained no time limitations. *Id.* 139. The court found the non-compete covenant unenforceable in Georgia. *Id.*

Florida and Georgia law also are diametrically opposed on the issue of extending a contractual non-compete period. Florida courts will extend by injunction the duration of a non-compete if necessary to prevent or remedy its breach.

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[9] Florida has no such constitutional prohibition.

Capeluto v. Orkin Ext. Co. of Fla., Inc., 183 So. 2d 532, 534 (Fla. 1966); *Zerographics, Inc. v. Thomas*, 537 So. 2d 140, 143 (Fla. 2d DCA 1989); *see*, *Fla. Stat.* § 542.335(1)(j) (restrictive covenant enforced by any appropriate and effective remedy, including temporary and permanent injunctions).[10] (App. F, 17a). Such a remedy is no stranger to Federal Courts either, when necessary to make the injured party whole. *See*, *Levitt Corp. v. Levitt*, 593 F. 2d 463 (2nd Cir. 1979) (trademark infringement and unfair competition suit). In the instant case the injunction enforcing the non-competition covenant was in effect until the day of the hearing resulting in the order appealed. The order modified the injunction by deleting this provision. Petitioner had requested the injunction be extended and that Defendants be denied modification of the injunction. The injunction could have been extended under Florida law. Petitioner was denied an evidentiary hearing by the lower Court to consider evidence of wrongdoing in violation of not only the non-compete, but the Court's own injunction restraining the competition.

On the other hand, under Georgia law, despite its violation, the duration of a non-compete will not be extended by injunction after its expiration. *See*, *Hogan Management Services, P.C. v. Martino*, 530 S.E. 2nd 508, 510 (Ga. Ct. App. 2000). In *Hogan Management*, the Court held that after the duration of a covenant not to compete has expired an action seeking injunctive relief pursuant to the covenant is "moot." *Id.* In the order appealed, the lower District Court determined Petitioner's motion for enlargement of the preliminary injunction was denied, "as moot." No authority was cited. In this respect, perhaps the lower court again was applying Georgia law. It certainly was not applying Florida law.

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[10] The remedy of injunction to enforce restrictive covenants also was provided in the parties' agreements.

The Eleventh Circuit affirmed the lower District Court's erroneous consideration of Georgia public interest and policy and application of Georgia law. They are irrelevant to the adjudication of the issues in this case. Florida law should have been applied since Florida was the "forum" state on the section 1404(a) transfer. *See*, *Ferens*, *supra*. The Eleventh Circuit has agreed with this concept. *See*, *Manley*, *supra*, 1467, F.N. 10. Petitioner requested the lower District Court at the injunction modification hearing to apply Florida law to the restrictive covenants and informed the court that Florida was the "forum" state whose law should apply on the case transferred for change of venue. (Vol. 3; Doc. 49, Pg. 41-49). The lower court treated the case, as evidenced by the decision appealed, as if the initial filing in the Florida District Court had no legal consequence whatsoever with respect to the issues adjudicated.

As a result of the lower court's decision, Petitioner was penalized for its use of section 1404(a) and its good faith effort to accommodate a more convenient forum for not only the parties but potential witnesses and others that necessarily might become involved in the litigation. The effect of the decision was to rewrite the parties' agreements by holding the restrictive covenants unenforceable under Georgia law. On the other hand, the court did not apply Florida law required by the parties' Florida choice-of-law provisions in those same agreements as well as required because Florida was the "forum" state. The result can serve only to encourage and produce the kind of forum-shopping and inequitable administration of laws that *Erie* seeks to avoid. *See*, *Semtek*, *supra* at 1028 (in context of removal from state to federal court).

The wrongdoers in this case, the Respondents, retained the full benefit of their bargain but were relieved of providing Petitioner the full duration of the non-competes for which they were obligated. As a consequence, Petitioner's right to

enforce and extend the non-competes for their violation was left on the Florida courthouse steps. In the process, some of the important matters the parties sought to be accomplished by their agreements were frustrated. The most effective remedy, an injunction, was denied. There may be no meaningful remedy at law due to the exceeding difficulty in proving the specific, concrete harm from violation of a non-compete. *See*, *Restatement (Second) of Contracts* § 360, comment b, 172 (1982) (the breach of a covenant not to compete may cause the loss of customers of an unascertainable number or importance).

II. THE DECISION BELOW AFFIRMS A MISAPPLICATION OF STATE LAW AND AN ERRONEOUS INVALIDATION OF THE PARTIES' CONTRACTUAL CHOICE-OF-LAW

The decision below, affirming the District Court's application of Georgia law to invalidate contractual restrictive covenants, was a misapplication of state law. Florida law should have been utilized to determine the validity and other matters with respect to the covenants. This is so because the parties contractually agreed to application of the Florida law. This court previously has granted certiorari to determine the applicable governing law in a case, *The Vessel M/V 'Tungus' v. Skovgaard*, 358 U.S. 588 (1959) as well as to address a lower court's misapplication of law. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

Florida law was selected by the parties in the agreements sued on that contained the non-compete provisions. Invalidity of a choice-of-law provision is required to be raised in the pleadings and necessitates an evidentiary hearing. *See*, *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507, 513 (Fla. 1981). Defendants did not plead invalidity of these choice-of-law provisions.

Defendants accepted the benefits of their contracts. This obligated them to any burdens that the contracts placed on them, including the Florida choice-of-law provisions of those contracts. The Eleventh Circuit recently confirmed this very principle. *See*, *Mazzoni Farms, Inc. v. E. I. DuPont DeNemours & Co.*, 223 F. 3d 1275, 1283 (11th Cir. 2000) (after certification *Mazzoni Farms, Inc. v. E. I. DuPont DeNemours & Co.*, 761 So. 2d 306 (Fla. 2000)).

Defendants never at any time pled Georgia law or policy. The Eleventh Circuit Court determined in *Stone v. Wall*, 135 F. 3d 1438 (11th Cir. 1998) that under Florida law the reliance on foreign law is a fact to be pleaded and proved. If the contrary is not alleged, the law of the sister state is assumed to be the same as Florida. *Id.* at 842. In addition to not being pled, no argument of Georgia law was timely raised outside the pleadings. The injunction was stipulated to without objection in the District Court in Florida. The validity and enforceability of the on-competes thereby were confirmed. Timely raising a choice-of-law issue is critical to its determination. *Stone*, *supra*, 1442.[11]

Application of Georgia law by the court deprived Petitioner of fundamental due process and a substantive right. Petitioner had a right for its contractual choice of Florida law to be enforced. The validity of the choice-of-law provision was not contested. The risk of having the choice-of-law contractually chosen by the parties to be discarded in favor of the law of a foreign forum, certainly will have a chilling effect upon seeking a section 1404 transfer in even the most meritorious of circumstances. This risk should be eliminated so that the remedial purposes and intent of section 1404(a) can be preserved.

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[11] Florida law also became the "law of the case" on transfer of the case from Florida to the Georgia District Court. *See*, *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F. 2d 1509, 1520 (10th Cir. 1991).

III. THE DECISION BELOW ERRONEOUSLY AFFIRMS A CHOICE-OF-LAW ANALYSIS TO SELECT THE APPLICABLE LAW

The lower court's decision affirmed the application of the law of the Georgia forum as a result of a conflict of law analysis, after a transfer from the Florida Federal District Court pursuant to 28 U.S.C. § 1404. This impermissably deprived Petitioner of state law advantages obtained by filing in the initial forum as well as by contractual agreement. Circumstances in which the law of the forum is applied in a case may justify the grant of a petition for certiorari due to the potentially serious constitutional issues involved. *See, Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960).

It was error for the Georgia District Court to engage in a conflict of law analysis to determine Georgia had more significant contacts and a greater interest in the case than Florida and to apply Georgia law and policy. Agreeing to application of Florida law in the parties' agreements ends any choice-of-law inquiry. *American Fuel Corp. v. Utah Energy Dev. Co.*, 122 F. 3d 130, 134 (2d Cir. 1997). The rule applies even though application of choice-of-law principles may direct application of laws of a different jurisdiction. *3COM Corp. v. Banco Do Brasil, SA*, 171 F. 3d 739, 743 (2d Cir. 1999). Moreover, the law and policy of the transferor forum are required to be applied upon a section 1404(a) transfer. *See, Ferens, supra*; *Headrick v. Atchison, T. & S.F. Ry. Co.*, 182 F. 2d 305, 309-10 (10th Cir. 1950); *Van Dusen, supra* 641, n. 45.

A contractual choice-of-law provision is presumed valid until it is proved invalid. *Mazzoni Farms, Inc. v. E. I. Dupont DeMenours & Co.*, 761 So. 2d 306, 310, 313 (Fla. 2000). Invalidation of the parties' choice-of-law agreement under Florida law is a matter required to be raised in the pleadings. *See, Continental Mortgage Investors, supra* at 513. It was not pled. No choice-of-law issues were appropriate to be decided

in this case. Petitioner should not have been deprived of its choice of Florida law that was secured by its agreement as well as by initially filing in the Florida forum.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

FREEMAN W. BARNER, JR. *
WATTERSON, HYLAND & KLETT, P.A.
4100 RCA Boulevard, Suite 100
Palm Beach Gardens, Florida 33410
(561) 627-5000

* Counsel of Record

Attorney for Petitioner

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed MAY 31 2001]

No. 00-14416

D.C. Docket No. 99-03336-CV-CC-1

HAZARD CONTROL TECHNOLOGIES, INC., a Florida Corporation, f.k.a., Fule Buster Laboratories, Inc.,
Plaintiff-Appellant,

versus

HAZARD MITIGATION SUPPLY, INC., a Sole Proprietorship, a.k.a., Hazard Mitigation, a.k.a., Fire Service Plus, a.k.a. Firetard, Inc.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached 11th Cir. R. 36-1 affirmance without opinion, included herein by reference, is entered as the judgment of this Court.

Entered: May 31, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed MAY 31 2001]

No. 00-14416

D.C. Docket No. 99-03336-CV-CC-1

HAZARD CONTROL TECHNOLOGIES, INC., a Florida Corporation, f.k.a., Fule Buster Laboratories, Inc.,
Plaintiff-Appellant,

versus

HAZARD MITIGATION SUPPLY, INC., a Sole Proprietorship, a.k.a., Hazard Mitigation, a.k.a., Fire Service Plus, a.k.a. Firetard, Inc.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(May 31, 2001)

THOMAS K. KAHN CLERK

Before BIRCH, MARCUS and WOOD *, *Circuit Judges.*

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* Honorable Harlington Wood, Jr., U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

PER CURIAM: AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) the judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) the judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed JUL 18, 2000]

Civil Action No. 1:99-CV-3336-CC

HAZARD CONTROL TECHNOLOGIES, INC.,
Plaintiff,

vs.

HAZARD MITIGATION SUPPLY, INC., RONALD E. THAMES,
and RONALD B. THAMES,
Defendants.

ORDER

Following a hearing on Defendants' motion to modify the Agreed Preliminary Injunction entered in this case by the United States District Court for the Southern District of Florida, and after reviewing the briefs submitted by the parties and the applicable law, the Court finds as follows:

The agreed preliminary injunction entered by the Florida Court prohibits Defendants from, among other things, manufacturing and/or selling any fire suppressant chemical. The injunction is based upon an exit agreement signed by Ronald E. Thames and a distributorship agreement signed by Ronald B. Thames on behalf of Hazard Mitigation Supply. Under the exit agreement signed by Ronald E. Thames, Ronald E. Thames was prevented from competing with Plaintiff for a period of two years from February 3, 1998, the date that the agreement was signed. Under the distributorship agreement, Ronald B. Thames and Hazard Mitigation Supply are prohibited from competing with Plaintiff for one year

following termination of the agreement. That agreement ended on May 22, 1999. Because the non-compete provisions in both the exit agreement signed by Ronald E. Thames and the distributorship agreement signed by Ronald B. Thames have expired pursuant to their own terms, the Court finds that modification of the injunction is warranted.[1]

Further, although both the exit agreement and the distributorship agreement entered into by defendants provide that Florida law will govern, this Court is not bound by this provision if it finds that the non-compete provisions in the agreements violate Georgia public policy. Because the Court finds that the non-compete provisions in the exit agreement and the distributorship agreement are contrary to the fundamental policy of Georgia, and further because the State of Georgia has a greater interest in this issue than does Florida insofar as both the Plaintiff and the Defendants reside in Georgia and the fire suppressant products are manufactured here, the Court will apply Georgia law to the agreements. Under Georgia law, the non-compete provisions in the agreements are overly broad insofar as they prevent Defendants from competing with Plaintiff anywhere in the world in any capacity with respect to fire suppressant chemicals. Such provisions are unenforceable in Georgia. *See, e.g., Enron Capital & Trade Resources Corp. v. Pokalsky,* 227 Ga. App. 727, 490 S.E.2d 136 (1997).

Accordingly, for the above-stated reasons, Defendants' Motion to Modify Preliminary Injunction [2b-1] is GRANTED. Paragraphs (a) and (b) of the Agreed Preliminary Injunction entered by the United States District Court for the Southern District of Florida are null and void as of the date of this Order. Paragraphs (c) through (e) of the Agreed Preliminary Injunction remain in full force and effect.

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[1] The Court notes here that the preliminary injunction expressly provides that it may be dissolved for good cause shown.

Plaintiff s Motion for Enlargement of Preliminary Injunction [28-1] is DENIED as moot.

It is SO ORDERED this 18th day of July, 2000.

/s/ Clarence Cooper
CLARENCE COOPER
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed SEP 17 1999]

99-8704 CIV-RYSKAMP
Magistrate Judge Vitunac

HAZARD CONTROL TECHNOLOGIES, INC., a Florida Corporation, f/k/a FUEL BUSTER LABORATORIES,
Plaintiff,

v.

HAZARD MITIGATION SUPPLY, INC., a Sole Proprietorship a/k/a HAZARD MITIGATION, a/k/a FIRE SERVICE PLUS, a/k/a FIRETARD INC., RONALD E. THAMES, and RONALD B. THAMES,

Defendants.

AGREED PRELIMINARY INJUNCTION

THIS CAUSE having come on before the Court upon the filing of a Verified Complaint and the Plaintiff's Ex Parte Emergency Motion For Temporary Restraining Order, and Order To Show Cause Why A Preliminary Injunction Should Not Issue, and the Court having issued an Ex Parte Temporary Restraining Order on September 13, 1999, including the scheduling of a hearing; on the issue of a Preliminary Injunction on September 16, 1999, and counsel for the Defendants acknowledging in open Court their agreement to the continuation of the terms of the Temporary Restraining Order as a Preliminary Injunction, and the Court having considered all the pleadings and proceedings heretofore had

in this cause, the Court hereby enters a Preliminary Injunction to this cause as follows:

The Defendants, Ronald E. Thames, Ronald B. Thames, and Hazard Mitigation Supply, Inc., a/k/a Hazard Mitigation, a/k/a Fire Service Plus, a/k/a Firetard, Inc., their agents, assigns, servants, employees, attorneys, and all persons acting in concert with them are hereby preliminary enjoined from:

(a) the manufacture, mixing, blending, preparation, or purchase of any fire suppressant chemical or component for the making of any fire suppressant chemical;

(b) transporting, distributing, selling, or offering to sell any fire suppressant chemical or component for the making of a fire suppressant chemical;

(c) using, without authorization, any of the Plaintiff's trademarks, including the trademarks "FUEL BUSTER";

(d) utilizing any other word, term, name, symbol, or device or any combination thereof, or any false designation of origin in connection with any goods or services of the Plaintiff, including without limitation, lot numbers related to the Plaintiff's fire suppressant chemicals; and

(e) concealing or destroying any documents or other media, including but not limited to, paper documents and electronic media such as computer files or video tapes, in any manner, that are related to the manufacture and/or distribution of any fire suppressant chemical or component for the making of a fire suppressant chemical.

IT IS FURTHER ORDERED that because of the agreement between the parties, the Court will require the posting of a security, as a predicate for this injunction, in the amount of $100.00, for the payment of such costs and damages as may be incurred or suffered by any party wrongfully enjoined.

IT IS FURTHER ORDERED that because the Preliminary Injunction entered herein is the subject of an agreement between the parties, that following the fiftieth (50th) day from entry of this Order, the Defendants may move that this Preliminary Injunction be dissolved for good cause shown, and may at any time seek the Court's review of the amount of security required herein.

/s/ Scott W. Zappolo
SCOTT W. ZAPPOLO ESQ.
WATTERSON, HYLAND
& KLETT, P.A.
4100 RCA Blvd., Suite 100
Palm Beach Gardens, FL 33410
Attorneys for Plaintiff

/s/ Kirk J. Girrbach
KIRK J. GIRRBACH, ESQ.
ALAN C. KAUFFMAN &
ASSOCIATES, P.A.
The Plaza, Suite 1102
5355 Town Center Rd.
Boca Raton, FL 33486
Attorneys for Defendants

IT IS SO ORDERED at West Palm Beach, in the Southern District of Florida, this 17 day of September, 1999.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

cc: SCOTT W. ZAPPOLO, ESQ.
KIRK J. GIRRBACH, ESQ.
EDWARD F. MCHALE, ESQ.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

[Filed DEC 20 1999]

Case No.: 99-8704-CIV-RYSKAMP

HAZARD CONTROL TECHNOLOGIES, INC. a Florida corporation f/k/a FUEL BUSTER LABORATORIES, INC.,
Plaintiff,

vs.

HAZARD MITIGATION SUPPLY, INC. a Sole Proprietorship, a/k/a HAZARD MITIGATION a/k/a FIRE SERVICE PLUS, a/k/a FIRETARD, INC.; RONALD E. THAMES; and RONALD B. THAMES,
Defendants.

ORDER OF TRANSFER

THIS CAUSE came before the Court on the Plaintiff's Motion to Transfer Venue, filed on November 23, 1999. The Motion is brought pursuant to 28 U.S.C. § 1404, Fed. R. Civ. P.15 and S.D. Local Rule 15.1.

The Defendants have not objected to the plaintiff's motion to transfer venue. Accordingly, it is

ORDERED AND ADJUDGED that the above numbered Cause be, and the same is, hereby TRANSFERRED to the Northern District of Georgia for all further proceedings.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 20 day of December, 1999.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:

SCOTT W. ZAPPOLO, ESQ.
KIRK GIRRBACH, ESQ.
TERRENCE J. WATTERSON, ESQ.
EDWARD F. MCHALE, ESQ.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed JUL 20, 2001]

No. 00-14416-FF

HAZARD CONTROL TECHNOLOGIES, INC., a Florida Corporation, f.k.a. , Fule Buster Laboratories, Inc.,

Plaintiff-Appellant,

versus

HAZARD MITIGATION SUPPLY, INC., a Sole Proprietorship, a.k.a., Hazard Mitigation, a.k.a., Fire Service Plus, a.k.a., Firetard, Inc.,

Defendant-Appellee,

On Appeal from the United States District Court
for the Northern District of Georgia

BEFORE: BIRCH, MARCUS and WOOD *, *Circuit Judges*.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]

UNITED STATES CIRCUIT JUDGE

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* Honorable Harlington Wood, Jr., U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX F

§ 542.335. Valid restraints of trade or commerce.

(1) Notwithstanding § 542.18 and subsection (2), enforcement of contracts that restrict or prohibit competition during or after the term of restrictive covenants, so long as such contracts are reasonable in time, area, and line of business, is not prohibited. In any action concerning enforcement of a restrictive covenant:

(a) A court shall not enforce a restrictive covenant unless it is set forth in a writing signed by the person against whom enforcement is sought.

(b) The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. The term "legitimate business interest" includes, but is not limited to:

1. Trade secrets, as defined in § 688.002(4).

2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.

3. Substantial relationships with specific prospective or existing customers, patients, or clients.

4. Customer, patient, or client goodwill associated with:

a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress";

b. A specific geographic location; or

c. A specific marketing or trade area.

5. Extraordinary or specialized training.

Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.

(c) A person seeking enforcement of a restrictive covenant also shall plead and prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction. If a person seeking enforcement of the restrictive covenant establishes prima facie that the restraint is reasonably necessary, the person opposing enforcement has the burden of establishing that the contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the established legitimate business interest or interests. If a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests.

(d) In determining the reasonableness in time of a postterm restrictive covenant not predicated upon the protection of trade secrets, a court shall apply the following rebuttable presumptions:

1. In the case of a restrictive covenant sought to be enforced against a former employee, agent, or independent contractor, and not associated with the sale of all or a part of:

a. The assets of a business or professional practice, or

b. The shares of a corporation, or

c. A partnership interest, or

d. A limited liability company membership, or

e. An equity interest, of any other type, in a business or professional practice,

a court shall presume reasonable in time any restraint 6 months or less in duration and shall presume unreasonable in time any restraint more than 2 years in duration.

2. In the case of a restrictive covenant sought to be enforced against a former distributor, dealer, franchisee, or licensee of a trademark or service mark and not associated with the sale of all or a part of

a. The assets of a business or professional practice, or

b. The shares of a corporation, or

c. A partnership interest, or

d. A limited liability company membership, or

e. An equity interest, of any other type, in a business or professional practice,

a court shall presume reasonable in time any restraint 1 year or less in duration and shall presume unreasonable in time any restraint more than 3 years in duration.

3. In the case of a restrictive covenant sought to be enforced against the seller of all or a part of:

a. The assets of a business or professional practice, or

b. The shares of a corporation, or

c. A partnership interest, or

d. A limited liability company membership, or

e. An equity interest, of any other type, in a business or professional practice,

a court shall presume reasonable in time any restraint 3 years or less in duration and shall presume unreasonable in time any restraint more than 7 years in duration.

(e) In determining the reasonableness in time of a postterm restrictive covenant predicated upon the protection of trade secrets, a court shall presume reasonable in time any restraint of 5 years or less and shall presume unreasonable in time any restraint of more than 10 years. All such presumptions shall be rebuttable presumptions.

(f) The court shall not refuse enforcement of a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract, provided:

1. In the case of a third-party beneficiary, the restrictive covenant expressly identified the person as a third-party beneficiary of the contract and expressly stated that the restrictive covenant was intended for the benefit of such person.

2. In the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party's assignee or successor.

(g) In determining the enforceability of a restrictive covenant, a court:

1. Shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought.

2. May consider as a defense the fact that the person seeking enforcement no longer continues in business in the area or line of business that is the subject of the action to enforce the restrictive covenant only if such discontinuance of business is not the result of a violation of the restriction.

3. Shall consider all other pertinent legal and equitable defenses.

4. Shall consider the effect of enforcement upon the public health, safety, and welfare.

(h) A court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement. A court shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract.

(i) No court may refuse enforcement of an otherwise enforceable restrictive covenant on the ground that the contract violates public policy unless such public policy is articulated specifically by the court and the court finds that the specified public policy requirements substantially outweigh the need to protect the legitimate business interest or interests established by the person seeking enforcement of the restraint.

(j) A court shall enforce a restrictive covenant by any appropriate and effective remedy, including, but not limited to, temporary and permanent injunctions. The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant. No temporary injunction shall be entered unless the person seeking enforcement of a restrictive covenant gives a proper bond, and the court shall not enforce any contractual provision waiving the requirement of an injunction bond or limiting the amount of such bond.

(k) In the absence of a contractual provision authorizing an award of attorney's fees and costs to the prevailing party, a court may award attorney's fees and costs to the prevailing party in any action seeking enforcement of, or challenging the enforceability of, a restrictive covenant. A court shall not enforce any contractual provision limiting the court's authority under this section.

(2) Nothing in this section shall be construed or interpreted to legalize or make enforceable any restraint of trade or commerce otherwise illegal or unenforceable under the laws of the United States or of this state.

(3) This act shall apply prospectively, and it shall not apply in actions determining the enforceability of restrictive covenants entered into before July 1, 1996.